Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(25) (21)

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ALABAMA, NEBRASKA, NORTH DAKOTA, AND SOUTH DAKOTA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion"—and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added))—criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The States of Alabama, Nebraska, North Dakota, and South Dakota, and the Commonwealth of the Northern Mariana Islands (hereinafter "the *amici* States") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4 in support of the Petitioners.

INTEREST OF *AMICI CURIAE*

Abortion has rightly been called "one of the most divisive issues of our time."[1] The *amici* States recognize that many of their citizens have deep convictions regarding abortion. Because they are responsible for upholding the rule of law and safeguarding social order, the *amici* States categorically condemn criminal acts of violence by or against those who consider themselves pro-life or pro-choice. As with any divisive issue, the debate over abortion calls for peaceful, reasoned discussion. The *amici* States seek to promote such peaceful engagement, and oppose efforts to silence either side.

The issues upon which the Court has granted certiorari have broad implications far beyond the context of the present case, which involves abortion protest activities. State governments have a profound interest in protecting both the physical safety and the fundamental rights of their citizens. The *amici* States thus have an interest in seeing that all citizens are protected while respecting any citizen's constitutionally protected interest in legitimate, peaceful protest, no matter what the underlying issue. More pragmatically, State officials are named as defendants in countless lawsuits alleging State interference with various individual rights. The *amici* States thus

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[1] Donald P. Judges, *Hard Choices, Lost Voices* 4 (1993).

have an interest in seeing that their officials do not face an unwarranted threat of civil RICO litigation arising from an overly expansive interpretation of the scope and purpose of that statute and the Hobbs Act. The Seventh Circuit's interpretation of the Hobbs Act and civil RICO threatens these interests and injects unnecessary ambiguity into the law of extortion.

SUMMARY OF ARGUMENT

In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court explained its "particular understanding of the genesis of private causes of action." *Id.* at 286. The decision below, which found an implied private cause of action for injunctive relief in the civil RICO statute, 18 U.S.C. § 1964(c) (2000), is inconsistent with this Court's holding in *Sandoval*. The text of the civil RICO statute manifests a congressional intent to authorize the Attorney General of the United States to seek injunctive relief under RICO, but to authorize private persons to seek only treble damages, costs, and attorney's fees. Nowhere does the statute authorize private entities to seek injunctive relief under RICO, and Congress has repeatedly refused to amend civil RICO to create such a private cause of action for injunctive relief. Moreover, the creation of a private cause of action for injunctive relief under civil RICO chills legitimate activity protected by the First Amendment.

The expansion of the definition of "extortion" under the Hobbs Act, 18 U.S.C. § 1951(b)(2) (2000), by the Seventh Circuit to prohibit conduct that does not involve "the obtaining of property" raises the specter of unwarranted civil RICO litigation against State officials. By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. This interpretation could subject almost any State

regulation of economic activity or property to civil RICO litigation. It also expands civil RICO to chill activity protected by the First Amendment in which protesters or demonstrators do not obtain property of any kind. Such untoward results are avoided by simply applying the Hobbs Act as written, to require an "obtaining of property."

The Seventh Circuit's expansion of the Hobbs Act (and, in turn, civil RICO) to apply to intangible, non-economic rights represents a substantial departure from the common law of extortion. At common law, extortion required the taking of "money," or "a thing of value" or a "valuable thing." Even under the "broad sense" of property used in modern Hobbs Act cases, "property" should be interpreted to mean, at most, a right with financial or economic value. The Court of Appeals' inclusion of intangible, non-economic rights in the meaning of "property" for purposes of the Hobbs Act leaves the "outer boundaries" of extortion under color of official right "ambiguous" and could have unintended consequences. The Hobbs Act simply does not apply to intangible, non-economic rights such as the "right[ ] to seek medical services." If it did, the Freedom of Access to Clinic Entrances Act of 1994 would have been unnecessary.

ARGUMENT

I. THE CREATION OF AN IMPLIED PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF UNDER CIVIL RICO VIOLATES THIS COURT'S "PARTICULAR UNDERSTANDING OF THE GENESIS OF PRIVATE CAUSES OF ACTION."

In this case, the Seventh Circuit found an implied private right of action to obtain injunctive relief under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. § 1964(c) (2000). Pet. App. at 6a–14a.[2] That holding violates the basic understanding of implied causes of action expressed by this Court in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In *Alexander* v. *Sandoval*, this Court observed:

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

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[2] All citations to "Pet. App." herein are to the Appendix to the Petition for Writ of Certiorari in No. 01-1118.

Id. at 286–87 (citations omitted) (emphasis added) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment)). Although the Court of Appeals cited *Sandoval*, Pet. App. at 6a, its analysis is inconsistent with the "particular understanding of the genesis of private causes of action" expressed in that decision.

The civil remedies provision of RICO provides, in pertinent part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) *The Attorney General may institute proceedings under this section.* Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) *Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the*

> *damages he sustains* and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964 (emphasis added).

The statute specifically provides that only the Attorney General "may institute proceedings under" § 1964 generally. 18 U.S.C. § 1964(b). Unlike the Attorney General, private persons are not authorized to "institute proceedings under" § 1964 generally. Instead, private persons have the far more limited ability to sue for business or property injuries sustained "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Recovery by private plaintiffs is limited to treble damages, costs, and attorney's fees, *id.*; nowhere does § 1964(c) authorize private persons to sue for injunctive relief under § 1964(a). As this Court noted in *Sandoval*, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. This is especially the case when the other method of enforcement (i.e., by the Attorney General) is specified in the immediately preceding subsection.

Given the plain text of the statute and the marked difference between the broad authority granted the Attorney General to sue under § 1964 and the limited authority granted private parties to sue only for damages, the Seventh Circuit's "parity of reasoning" approach, Pet. App. at 8a, is inappropriate. That approach renders the differences between the statutory language in § 1964(b) and § 1964(c) meaningless. It effectively amends § 1964(c) to state that a person injured by a violation of § 1962 "shall recover [, *in addition to any relief authorized in subsection (a) to which he is entitled*,] threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee."

Congress had (and has) the ability to write the RICO statute that way, of course, but has repeatedly chosen not

to do so. *See* Pet. in No. 01-1119 at 16–19 & n.22 (recounting history of attempts to amend RICO to authorize private injunctive actions). The federal courts should not, therefore, create that result "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287. As this Court recently stated in a patent case, the task of statutory interpretation "is not to determine what would further Congress's goal . . ., but to determine what the words of the statute must fairly be understood to mean." *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1895 (2002).

In the context of this case, moreover, the addition of private injunctive remedies to the already powerful treble damages available to private persons is neither desirable "as a policy matter" nor in furtherance of "Congress's goal." The application of civil RICO to political or social protest activities has a substantial chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further. Congress never intended such a result.

II. THE EXPANSION OF THE HOBBS ACT TO PROHIBIT CONDUCT THAT DOES NOT INVOLVE "THE OBTAINING OF PROPERTY" RAISES THE SPECTER OF UNNECESSARY CIVIL RICO LITIGATION AGAINST STATE OFFICIALS.

A second troubling feature of the Seventh Circuit's decision is its interpretation of the "obtaining of property" element in the definition of extortion under the Hobbs Act, 18 U.S.C. § 1951 (2000). The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or

threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). An act indictable under the Hobbs Act, in turn, is a predicate act under RICO. 18 U.S.C. § 1961(1)(B) (2000).

The Court of Appeals noted that it "has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and chose not to revisit that holding. Pet. App. at 29a (citation omitted) (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)). The court then rejected petitioners' argument "that, even if 'property' was involved, the defendants did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Id.* The Court of Appeals observed that according to its precedent, " 'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.' " *Id.* (quoting *United States* v. *Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

The difficulty with the Seventh Circuit's interpretation is not one of applying the Hobbs Act to intangible property. Pet. App. at 29a (citing *Anderson*, 716 F.2d at 450). The Courts of Appeals have applied the Hobbs Act to intangible property. *See, e.g.*, *Libertad* v. *Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (binding precedent in both Fifth and Eleventh Circuits). This Court has similarly held that the mail and

wire fraud statutes[3] apply to intangible property. *Carpenter* v. *United States*, 484 U.S. 19, 25–27 (1987).

The principal flaw in the Seventh Circuit's interpretation is that, under the Hobbs Act definition of extortion, someone must *obtain* (or attempt or conspire to obtain)[4] the victim's property—whether tangible or intangible. As Petitioner points out, the Ninth Circuit has held that this "obtaining" element is critical to finding a violation of the Hobbs Act:

> The four conspirators sought not only to put Blitzstein [the victim] out of business, but actually to get his business interests for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof." But under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone—either the extortioner or a third person—must receive the property of which the victim is deprived.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (citations omitted) (quoting *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.1964)).

By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act—

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[3] 18 U.S.C. §§ 1341, 1343 (2000).

[4] *See* 18 U.S.C. § 1951(a) ("or attempts or conspires so to do"). As used herein, references to "obtaining" include attempting to obtain or conspiring to obtain.

and thus civil RICO. As Petitioners assert, this interpretation "creates considerable mischief for government actors." Pet. in No. 01-1119, at 20. Perhaps not every act of official misconduct would implicate the kind of intangible economic interests protected by the Hobbs Act, and thus civil RICO. Many official actions certainly would implicate economic interests, however. If "obtaining" tangible or intangible property were not required in order to violate the Hobbs Act, a host of State actions that affect economic interests could conceivably become the subject of civil RICO litigation.

For example, under the Seventh Circuit's interpretation of the "obtaining of property" element of the Hobbs Act, a plaintiff alleging that excessive police force resulted in a loss of wages could allege a Hobbs Act violation, and thus a RICO predicate act. Any police or sheriff's department facing two or more excessive force claims could face a RICO lawsuit, provided the victims alleged that there was some "pattern" to the use of excessive force. *See, e.g.*, *Guerrero* v. *Gates*, 110 F. Supp. 2d 1287, 1292–93 (C.D. Cal. 2000) (denying motion to dismiss civil RICO action against police officers based on plaintiff's pecuniary losses said to result from alleged police misconduct); *see generally* Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) (advocating use of civil RICO against police for repeated civil rights violations, based on victims' pecuniary losses).

Removing the "obtaining" element would substantially broaden the Hobbs Act definition of extortion so that it could even apply to State economic, health, or environmental regulation. This would open the way for civil RICO litigation over any number of governmental decisions that inevitably have economic impact. If those decisions turned out to have been based upon a misunderstanding of the law, and businesses suffered

pecuniary losses as a result of the later-invalidated regulation or statute, those businesses' traditional claims for damages could also become Hobbs Act claims and used as RICO predicate acts.

For example, consider the potential impact of civil RICO on a local ordinance prohibiting smoking in indoor public places. After enacting the ordinance, local officials threaten the owners of all bars and nightclubs in town with prosecution if they do not comply with the ordinance. After months of sharply reduced business as a result of the indoor smoking ban, the owners of several clubs sue the city for injunctive relief—and include a claim for damages resulting from reduced business due to the ban. The trial court concludes that the ordinance is invalid under State law.[5] Under the Seventh Circuit's expansive interpretation of the "obtaining of property" for purposes of the Hobbs Act, it might be alleged that the city wrongfully "obtained" the clubs' property interest in doing business in the city free from unlawful (and thus "wrongful")

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[5] *See, e.g., Dutchess/Putnam Rest. & Tavern Ass'n, Inc.* v. *Putnam County Dep't of Health*, 178 F. Supp. 2d 396 (S.D.N.Y. 2001) (holding provision in county sanitary code purporting to regulate smoking in public places invalid under State constitution); *Leonard* v. *Duchess County Dep't of Health*, 105 F. Supp. 2d 258 (S.D.N.Y. 2000) (same); *Justiana* v. *Niagara County Dep't of Health*, 45 F. Supp. 2d 236 (W.D.N.Y. 1999) (same); *Mich. Restaurant Ass'n* v. *City of Marquette*, 245 Mich. App. 63, 626 N.W.2d 418 (2001); *LDM, Inc.* v. *Princeton Reg. Health Comm'n*, 336 N.J. Super. 277, 764 A.2d 507 (Law Div. 2000) (holding local ban on smoking in most indoor places invalid because preempted by state law); *Nassau Bowling Propreitors* Ass'n v. *County of Nassau*, 965 F. Supp. 376 (E.D.N.Y. 1997); *Alford* v. *City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979) (holding local ordinance invalid and reversing conviction under it). *But see Amico's Inc.* v. *Mattos*, 789 A.2d 899 (R.I. 2002) (upholding ordinance); *City of Tucson* v. *Grezaffi*, 200 Ariz. 130, 23 P.3d 675 (Ct. App. 2001); *Tri-Nel Management, Inc.* v. *Bd. of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001); *Ore. Rest. Ass'n* v. *City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000); *Empire State Rest. & Tavern Ass'n, Inc.* v. *Rapoport*, 240 A.D.2d 576, 658 N.Y.S.2d 687 (1997).

restrictions on smoking. Because there are at least two such clubs, the same threats of prosecution were made to the owners of each, and the owners all "feared" prosecution, the city and its officials could find themselves facing a civil RICO action for treble damages.

Such examples are not limited to the context of regulating smoking. One can imagine similar scenarios in disputes over handguns, zoning actions, permitting and licensing activities, regulation of sexually oriented businesses, patent infringement, environmental regulations, and so on. Of course, qualified immunity and the *mens rea* element for Hobbs Act violations would shield government officials from civil RICO liability in many such situations. *See, e.g.*, *Brown* v. *NationsBank Corp.*, 188 F.3d 579, 587–88 (5th Cir. 1999) (applying qualified immunity to civil RICO claim), *cert. denied*, 530 U.S. 1274 (2000); *see also Evans*, 504 U.S. at 277 (KENNEDY, J., concurring) (discussing *mens rea* requirement in Hobbs Act cases). RICO's treble damages would nonetheless triple the compensatory damages plaintiffs would otherwise recover in cases where those defenses were unsuccessful, however. The automatic trebling of compensatory damages could frustrate decades spent by this Court carefully balancing the vindication of civil and constitutional rights against the risk of unduly inhibiting governmental officials in the *lawful* exercise of their discretionary functions. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982).[6] The

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[6] "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (footnote omitted) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

imposition of compensatory damages, and, in appropriate cases, punitive damages, is better calibrated toward maintaining the balance this Court has struck.

III. THE EXPANSION OF "PROPERTY" UNDER THE HOBBS ACT TO INCLUDE INTANGIBLE, NON-ECONOMIC RIGHTS DEPARTS FROM THE COMMON LAW OF EXTORTION.

The Seventh Circuit's expansion of "property" under the Hobbs Act to apply to mere interference with intangible, non-economic rights of the victim, *see* Pet. App. at 29a (identifying "the class women's rights to seek medical services from the clinics"), is also troubling. This interpretation of "property" represents a marked departure from the common-law definition of extortion.

In *Evans* v. *United States*, 504 U.S. 255, 261–64 (1992), this Court "observed that 'extortion' in 18 U.S.C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law." *Carter* v. *United States*, 530 U.S. 255, 266 (2000). "At common law, extortion was an offense committed by a public official who took 'by colour of his office' *money* that was not due to him for the performance of his official duties." *Evans*, 504 U.S. at 260 (footnote omitted) (emphasis added). Supporting this definition of common-law extortion, the Court noted that "Blackstone described extortion as 'an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any *money or thing of value*, that is not due to him, or more than is due, or before it is due." *Id.* at 260 n.4. (quoting 4 William Blackstone, *Commentaries* *141) (emphasis deleted and added). The Court also noted that

> Hawkins' definition of extortion is probably the source for the official right language used in the Hobbs Act. Hawkins defined extortion as follows: "[I]t is said, That extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of *money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due."

Id. (quoting 1 William Hawkins, *Pleas of the Crown* 316 (6th ed. 1787)) (emphasis added) (citation omitted) (citing James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 864 (1988)). Hawkins's definition was partly based on Lord Coke's, which read: "Extortion, in its proper sense, is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any *money or valuable thing* . . . either that is not due, or more than is due, or before it be due . . . ." Lindgren, 35 UCLA L. Rev. at 864 n.287 (quoting 3 Edward Coke, *A Systematic Arrangement of Lord Coke's First Institute* 587 (J.H. Thomas ed. 1826)) (emphasis added).

As shown by the italicized language from *Evans* and these common-law treatises, common-law extortion involved the taking of "money" or a "thing of value" or a "valuable thing." For example, in *Rex* v. *Burdett*, 91 Eng. Rep. 996 (K.B. 1696), a farmer was tried for extortion because "he had taken divers sums of money of the market people for rent for the use of the little stalls in the market, and divers great sums for fines." *Id.* at 996. The court noted "that if the defendant erects several stalls, and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, *the taking of money* for the use of the stalls in such case is extortion." *Id.* (emphasis added). The court went on to

observe that "the extorsive agreement, or the usurious agreement, is not the offence, *but the taking* . . . ." *Id.* at 997 (emphasis added). Thus, the farmer's interference with the other market people's sales, standing alone, was insufficient to make out a case of common-law extortion; it was the use of that interference *to obtain money* from them that constituted extortion.

American cases were also quite strict in their interpretation of "money" or "thing of value." In an early Massachusetts case, the court held that a deputy sheriff's receipt of a negotiable note for higher fees than allowed by statute was not extortion. *Commonwealth* v. *Cony*, 2 Mass. 523 (1807). The court observed that "[t]o constitute extortion at common law, there must be the receipt of money, or of some other thing of value." *Id.* at 524. The court concluded that the deputy's receipt of a negotiable note did not constitute extortion because "the receipt of a negotiable note . . . is not the payment of money" and the note, being "*ipso facto* void, . . . was consequently of no value." *Id.* In a later case, the court explained its rationale: "The fees may never be received, . . . and the essence of the offence, which is the receiving, will never have occurred." *Commonwealth* v. *Pease*, 16 Mass. 91, 93 (1819); *see also La Tour* v. *Stone*, 139 Fla. 681, 695, 190 So. 704, 710 (1939) ("A mere agreement to pay will not be sufficient . . . .") (quoting annotation following *Commonwealth* v. *Mitchell*, 66 Ky. (3 Bush) 25, 96 Am. Dec. 192, 195 (1867), which cited *Cony*, *Pease*, and *Burdett*).

In modern Hobbs Act cases, lower courts have held that the concept of "property" that must be obtained in order to violate the Act is not limited to money or tangible property, "but includes, in a broad sense, any valuable right considered as a source or element of wealth." *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). This "broad sense" of property in the modern cases also expresses its limitation,

however: A "property" interest must have economic or financial value. *Cf.* Randy J. Curato et al., *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 Notre Dame L. Rev. 1027, 1061 (1983) ("It appears, then, that the interest must at least have economic value, and the cases support this notion.").

In *Evans*, this Court noted that the models for the Hobbs Act were "the New York [extortion] statute,"[7] and "the Field Code, a 19th-century model code."[8] 504 U.S. at 263 n.9. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court observed that, under New York's extortion statute, "[a]n accused . . . could not be convicted without sufficient evidence that he 'was actuated by the purpose of obtaining *a financial benefit* for himself . . . .'" *Id.* at 406 n.16 (emphasis added) (quoting *People* v. *Adelstein*, 9 A.D.2d 907, 908, 195 N.Y.S.2d 27, 28 (1959), *aff'd sub nom. People v. Squillante*, 8 N.Y.2d 998, 169 N.E.2d 425 (1960)); *see also* Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 140 (quoting *Enmons* and concluding that the conduct pleaded in *Scheidler* is "criminal coercion," not extortion); Craig M. Bradley, *NOW v. Scheidler Round Two*, 27 Syracuse J. Int'l L. & Com. 233, 239 (2000) (same).

Thus, the classic case of common-law extortion was what this Court described in *Evans*—"a public official who took 'by colour of his office' *money* that was not due to him for the performance of his official duties." 504 U.S. at 260 (footnote omitted) (emphasis added). Similarly, "[t]he usual fact situation for a Hobbs Act charge under color of official right is a public official trading his/her official actions in [an] area in which he/she has actual authority

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[7] Penal Law of 1909, § 850, as amended, 1917 N.Y. Laws, ch. 518 (codified at N.Y. Penal Law § 850 (McKinney Supp. 1965)).

[8] Comm'rs of the Code, *Proposed Penal Code of the State of New York* § 613 (1865).

in exchange for the *payment of money*." U.S. Dep't of Justice, *Criminal Resource Manual* 2404 (Oct. 1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02404.htm (emphasis added).

The Court of Appeals' inclusion of the intangible, non-economic "right[ ] to seek medical services," Pet. App. 29a, within the meaning of "property" for purposes of the Hobbs Act could have a disturbing spillover effect on extortion under color of official right. Substituting certain intangible, non-economic rights for "money" in the Justice Department's description of the "usual fact situation for a Hobbs Act charge under color of official right," could lead to unintended results. It would also leave the "outer boundaries" of extortion under color of official right "ambiguous," and ultimately might even "involve[ ] the Federal Government in setting standards of . . . good government for local and state officials . . . ." *McNally* v. *United States*, 483 U.S. 350, 360 (1987).

This Court has never interpreted "property" under the Hobbs Act to include intangible, non-economic rights such as the "right[ ] to seek medical services," Pet. App. at 29a. Moreover, it has held that the mail and wire fraud statutes do not apply to similar kinds of intangible rights. *See Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) ("But far from composing an interest that 'has long been recognized as property,' these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate.") (quoting *Carpenter*, 484 U.S. at 26); *McNally*, 483 U.S. at 360–61.

Because the Hobbs Act does not reach such non-economic rights as the "right[ ] to seek medical services," Congress passed the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), Pub. L. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2000)), to protect access to reproductive health clinics. Attorney

General Janet Reno testified in support of enacting FACE. After reviewing the limited potential applicability of 42 U.S.C. § 1985(3) to "interference with abortion rights" after *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Attorney General testified that the Department of Justice had not "been able to identify *any other Federal law that would be generally applicable to private interference with a woman's right to choose.*" *The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Senate Committee on Labor and Human Resources*, 103d Cong. 10 (1993) (emphasis added) (statement of Attorney General Janet Reno). In an extended prepared statement addressing, *inter alia*, "[t]he inadequacy of existing federal law," *id.* at 14 (emphasis removed) (prepared statement of Attorney General Janet Reno), the Attorney General did not mention the possibility of applying the Hobbs Act to abortion protest activity. *See id.* at 14–16. For similar reasons, the National Association of Attorneys General adopted a resolution asking "Congress to adopt legislation designed to protect women, physicians and other health personnel from violence aimed at family planning clinics across the country where abortions are performed, without unduly infringing on the right to peaceful protest . . . ." *Id.* at 164 (annex to statement of Robert Abrams); *see id.* at 163 (citing *Bray*). If the Hobbs Act, and thus civil RICO, were as broadly applicable as Respondents now assert, FACE would have been unnecessary.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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July 12, 2002